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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL ZERNICEK,
Petitioner,

v.

PETROLEOS MEXICANOS ("Pemex"),
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the physical suffering and economic expense an American citizen is subjected to in the United States as a result of having been injured abroad due to the negligence of an agency of a foreign government is a "direct effect" within the meaning of 28 U.S.C. § 1605 (a)(2) (1986) so as to constitute an exception to the foreign government's sovereign immunity.

2. Whether Pemex, an agency of the Mexican government, impliedly waived its sovereign immunity under 28 U.S.C. § 1605(a)(1), by requiring CCC, a Mexican corporation, in a written agreement, to designate Brown & Root, Inc., an American corporation, as its subcontractor when the contract between Pemex and CCC designated Mexican law as applying to the resolution of disputes and the contract between CCC and Brown & Root, Inc. designated United States law as applying to the resolution of disputes.

LIST OF PARTIES

Petitioner, Michael Zernicek.

Petroleos Mexicanos ("Pemex"), Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Michael Zernicek, respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A. p. 1a) is reported at 826 F.2d 415 (5th Cir. 1987). The opinion of the District Court (App. B, p. 13a) is reported at 614 F.Supp. 407 (S.D. Tex. 1985).

JURISDICTION

The judgment of the Court of Appeals (App. C, infra, p. 32a) was entered on September 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West 1966).

STATUTE INVOLVED

This case involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. The pertinent provisions of the Act are:

"§ 1605 General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a

commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the excercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abuse, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . ."

STATEMENT

Defendant Pemex, an agency of the government of Mexico, conducted oil and gas exploration and production operations in the Bay of Campeche (Gulf of Mexico) beginning in 1980. It is undisputed that these activities were commercial in nature.

Pemex wished to utilize the services of Brown & Root, Inc., a United States corporation, in futherance of its project in the Bay of Campeche. Mexican law did not permit Pemex to contract directly with a U. S. corporation, however, which required Pemex to engage Brown & Root, Inc., through some Mexican company. Pemex therefore contracted with Corporacion de Construcciones de Campeche, S.A. de C.V. ("CCC"), naming CCC as general contractor for the envisioned work. Although CCC was a Mexican company, 49% of its ownership was held by Brown & Root, Inc., a U. S. corporation. The remaining 51% was held by a Mexican company called Corporacion de Industrias y Construciones S.A. de C.V., or "CIC", which was wholly owned by a Mexican national.

In its contract with CCC, Pemex stipulated that Brown & Root, Inc., should be "DESIGNATED SUBCONTRACTOR" for the work in the Bay of Campeche. Pemex also gave its "express consent" for CCC to negotiate (in effect, required CCC to negotiate) whatever contracts with Brown & Root, Inc., should prove to be necessary to that end. Pemex was thus fully aware from the beginning that employees of Brown & Root, Inc., i.e., U. S. citizens, would be working in the Bay of Campeche under Pemex's ultimate control.

This contract between CCC and Brown & Root, Inc., specified that any action arising, in contract or in tort, should be governed by the laws of the State of Texas. Although Pemex did not directly sign this contract, it was executed pursuant to Pemex's authority and in fulfillment of Pemex's express desires as stated in the contract between Pemex and CCC.

Plaintiff Michael Zernicek was an employee of Brown & Root, Inc., during the period April, 1981 through April, 1982, as a member of a crew assigned to a fleet of vessels in the Bay of Campeche.

Radioactive materials were stored and used on the vessels. These radioactive materials were supplied by Rayos X, and were under Pemex's ultimate control. Defendant Pemex knew of complaints made concerning CCC's dangerous storage and handling of the radioactive materials aboard the vessels.

Plaintiff Michael Zernicek thus was exposed to excessive doses of "hot" gamma radiation. Gradually, but inevitably, he began to exhibit symptoms of radiation sickness. He reported his undiagnosed malady to his superiors at Brown & Root, Inc., and in November, 1981, he sought medical attention in the United States. Because radiation sickness is peculiarly difficult to diagnose accurately in its early stages, Michael Zernicek returned to Pemex's project in the Bay of Campeche unaware of the true nature of his illness and worked there until April, 1982.

Petitioner brought an action for damages in the United States District Court for the Southern District of Texas, which was dismissed for want of personal jurisdiction. The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

I.

Whether the physical suffering and economic expense an American citizen is subjected to in the United States as a result of having been injured abroad due to the negligence of an agency of a foreign government is a "direct effect" within the meaning of 28 U.S.C. § 1605(a)(2) (1986) so as to constitute an exception to the foreign government's sovereign immunity.

Pemex's negligence in the Bay of Campeche had many direct effects in the United States, if we give to language its clear and ordinary meaning. Pemex's activities directly caused Michael Zernicek's exquisite and ongoing physical suffering in the U.S. and substantial medical expense in the U.S. as well. It directly caused the U.S. labor force to be diminished and the U.S. tax treasury to be deprived of funds.

The only reason for disallowing these direct effects in the United States is a narrow line of case law which sprang from an interpretative mutation requiring suspension of reason, promoting gross inequity, defeating congressional purpose, and which has since been rejected by Circuit courts across the land in its application to corporate plaintiffs.

This line began when the district court in *Upton v. Empire of Iran,* 459 F.Supp. 264 (D.C. 1978), aff'd mem., 607 F.2d 494 (D.C. Cir. 1979), groped for help in interpreting the vague, new FSIA and grasped its own local long-arm statute as the nearest tool at hand. The *Upton* court then read the FSIA (a federal law) as if

it were the District of Columbia long-arm statute, 13 D.C. Code § 13-423(a)(4) (1973), thereby grafting the meaning of language which concerned D.C. "in personam" jurisdiction on to language which concerned federal subject matter jurisdiction. The *Upton* court thus interpreted the FSIA as if it had been swallowed shortly after birth by the lurking local statute, so that the two had now become as one. As a result of that disastrous hermeneutic, *Upton* came to stand for the notion that physical suffering and financial loss were excluded, per se, from consideration as direct effects under § 1605(a)(2) of the Act. *Upton* 459 F.Supp. at 266.

Since that time, numerous Circuits have rejected the parsiminous results the *Upton* rationale imposed on behalf of corporate plaintiffs. Catching the fresh breeze of congressional intent, the Second Circuit announced in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 312-313 (2nd Cir. 1981), cert. denied, 454 U.S. 1148 (1982), that the FSIA's real purpose was to allow aggrieved American citizens into court, and that neither rigid definitions nor state statutes should prevent the courts from implementing that equitable end. The Fifth Circuit followed the same compass of congressional intent in *Callejo v. Bancomer, S.A.,* 764 F.2d 1101, 1111 (5th Cir. 1985), as did the Eleventh Circuit in *Harris Corporation v. National Iranian Radio and Television,* 691 F.2d 1344 (11th Cir. 1982), and the District of Columbia Circuit in *Transamerican Steamship Corp. v. Somali Democratic Republic,* 767 F.2d 998 (D.C. Cir. 1985). Only the Ninth Circuit has refused to do so, in the case of *Yugoexport, Inc. v. Thai Airways International, Ltd.,* 749 F.2d 1373 (9th Cir. 1984), cert. denied, 471 U.S. 1101, 105 S. Ct. 2326 (1985), and

it called attention to the difference between it and the other Circuits at that time.

The liberation that has come to corporations, however, has not yet been proclaimed officially for ordinary men and women—the very persons for whom Congress drafted the FSIA, 28 U.S.C.A. §§ 1602-07. The Fifth Circuit has said in *Calagas v. Calhoon,* 309 F.2d 248, 255 (5th Cir. 1962), that the same standards of fairness should govern both corporations and natural persons in deciding questions of jurisdiction. This Court now has the opportunity to fulfill congressional purpose by applying that sound and reasonable rule.

II.

Whether Pemex, an agency of the Mexican government, impliedly waived its sovereign immunity under 28 U.S.C. § 1605(a)(1), by requiring CCC, a Mexican corporation, in a written agreement, to designate Brown & Root, Inc., an American corporation, as its subcontractor when the contract between Pemex and CCC designated Mexican law as applying to the resolution of disputes and the contract between CCC and Brown & Root, Inc. designated United States law as applying to the resolution of disputes.

Pemex waived its immunity by implication when, in its contract with CCC, it specified that Brown & Root, Inc., should be its designated contractor, then explicitly authorized CCC to enter whatever contracts should be necessary with Brown & Root, Inc., to bring that result about. Pursuant to Pemex's wishes, and based on Pemex's authorization just mentioned, CCC then executed a contract with Brown & Root, Inc., engaging its services and

that of its U.S. employees for Pemex's work in the Bay of Campeche. In this contract, made with Pemex's direct authority, CCC specified that any actions arising, in tort or in contract, should be governed by the law of the State of Texas, United States of America.

Following the logic and law of *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390 (2nd Cir. 1985), a case the facts of which are analogous in numerous respects to those now before this Court, it is clear that Pemex waived its immunity by implication if not explicitly. To hold otherwise violates the express rule of the U.S. Supreme Court, set out in *Anderson v. Abbott*, 321 U.S. 349 (1944), which says that the interposition of a corporation must not be allowed to defeat legislative policy, even if that is only the result of the action and not the intent. Sufficient grounds exist, therefore, for a finding of subject matter jurisdiction under § 1605(a)(2) and under § 1605(a)(1) of the FSIA.

Since Pemex was served in accordance with the provisions of the FSIA, and since service of adequate notice is not at issue, it is not necessary to establish "in personam" jurisdiction as a separate task. It is necessary to show that "in personam" jurisdiction would not violate the principles of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. That task requires but little labor, however, since Pemex's contacts with the United States constitute not only the minimal sort required by *International Shoe*, but also the substantial sort which, under *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), justify general jurisdiction over a defendant

whose contacts with the forum are unrelated to the activities giving rise to the particular cause of action. The United States thus has jurisdiction over Pemex in this action and must require it to account for its misdeeds.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Michael ZERNICEK,
Plaintiff-Appellant,

v.

BROWN & ROOT, INC., et al.,
Defendants,

Petroleos Mexicanos,
Defendant-Appellee.

No. 85-2663.

United States Court of Appeals,
Fifth Circuit.

Sept. 11, 1987.

Employee of subcontractor brought action against Mexican national petroleum company for personal injuries at job site in Mexico as result of exposure to radiation. Following removal from state court, the United States District Court for the Southern District of Texas, 614 F.Supp. 407, Carl O. Bue, Jr., J., dismissed action, and employee appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) eventual effect in United States of personal injury suffered by American employee in Mexico was not "direct" so as to constitute waiver of sovereign immunity under commercial activities exception to Federal Sovereign Immunities Act, and (2) Mexican company did not impliedly waive its immunity, where general contract was subject only to jurisdiction of Mexican courts.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, GARZA and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Under the Foreign Sovereign Immunities Act (FSIA), is a foreign-government agency immune from suit in the United States if a United States citizen sustains personal injuries in that sovereign's territory while working for a United States corporation that had contracted to conduct mineral exploration activity there? The district court correctly held that the Act shields the foreign-government agency.

I.

Petroleos Mexicanos (Pemex), an agency of the government of Mexico, was conducting mineral exploration and production operations in the Bay of Campeche, a part of the Gulf of Mexico in Mexican territorial waters. Pemex wished to engage the services of Brown & Root, Inc., a corporation domiciled in Texas, but could not do so directly because Mexican law requires that governmental agencies contract with Mexican corporations. Pemex therefore engaged as its general contractor Corporacion de Construcciones de Campeche (CCC), a company organized under Mexican law. Brown & Root owned 49% of CCC, and the remaining 51% was owned by a Mexican company wholly owned by a Mexican national. The contract between Pemex and CCC stipulated that Brown & Root would be the "designated subcontractor" for the Bay of Campeche project, and Pemex agreed to pay Brown & Root directly in U. S. dollars. The contract also provided that any disputes that might arise

between Pemex and CCC would be governed by Mexican law, submitted to conciliation, and, if conciliation efforts failed, would be decided by Mexican courts. CCC's subcontract with Brown & Root, however, specified that any dispute between them would be governed by Texas law.

Brown & Root assigned Michael Zernicek, a United States citizen employee, to a tour of duty on a fleet of vessels working on the Bay of Campeche project. Radioactive materials supplied by Rayos X, a Mexican firm, were used and stored on the vessels, allegedly under Pemex's control. Zernicek contends that he was exposed to excessive doses of radiation as a result of Pemex's negligence. Zernicek eventually returned to the United States, where he now resides. He filed suit against Pemex, Rayos X, CCC, and Brown & Root in the United States District Court for the Southern District of Texas, seeking damages and contending that he is still suffering from the effects of his exposure. Zernicek subsequently settled his claims against Brown & Root and CCC. In a reported opinion, the district court upheld Pemex's defense of sovereign immunity and dismissed Zernicek's claims against Pemex.[1]

II.

For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in its courts.[2] Because foreign-sovereign immunity is a matter of grace and comity under interna-

1. *Zernicek v. Petroleos Mexicanos (Pemex)*, 614 F.Supp. 407 (S.D. Tex. 1985).

2. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 1967, 76 L.Ed.2d 81 (1983).

tional law, and not a restriction imposed by the Constitution, courts deferred to the decisions of the political branches, according immunity when requested by the Executive branch through the State Department.[3]

The State Department ordinarily requested immunity for friendly foreign sovereigns. Then, in 1952, in a letter written by Jack B. Tate, Acting Legal Adviser in the Department of State, to the Acting Attorney General,[4] the State Department announced that it was adopting a "restrictive" theory of foreign sovereign immunity. The shield would extend to suits involving the foreign government's public acts but not to suits in connection with a foreign state's strictly commercial acts. Pursuant to this policy, the State Department made "suggestions of immunity" to the courts. Consequently, foreign nations "often placed diplomatic pressure on the State Department," and political considerations led to immunity in cases in which it would have been unavailable under the restrictive theory.[5] If, as was sometimes the case, the foreign nation did not seek the assistance of the State Department, the courts had the responsibility for determining immunity. Thus, as the Supreme Court said in *Verlinden B.V. v. Central Bank of Nigeria*,[6] "sovereign immunity determinations

3. *See id.* at 486, 103 S. Ct. at 1967-68.

4. 26 Dept. of State Bull. 984 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15, 96 S. Ct. 1854, 1869-71, 48 L.Ed.2d 301 (1976).

5. *Verlinden*, 461 U.S. at 487, 103 S. Ct. at 1968 (citing Testimony of Monroe Leigh, Legal Adviser, Department of State, Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 34-35 (1976)).

6. 461 U.S. 480, 488, 103 S. Ct. 1962, 1968, 76 L.Ed.2d 81 (1983).

were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."

In 1976, Congress enacted the FSIA to provide a comprehensive scheme governing "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States."[7] The government would thus be freed from case-by-case diplomatic pressures, and litigants would be assured that decisions would be made "on purely legal grounds and under procedures that insure due process."[8]

The Act declares that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned."[9] After defining "foreign state" to include agencies or instrumentalities of the state,[10] the Act declares foreign states "immune from the jurisdiction of the courts of the United States and of the States except" as it provides.[11] While the Act contains numerous exceptions, Zernicek relies on only two: The first is the commercial activities exception which denies immunity in "any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state

7. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6604 [hereinafter H.R. Rep. No. 94-1487].

8. *Id.* at 7, 1976 U.S. Code Cong. & Admin. News at 6606.

9. 28 U.S.C. § 1602 (1982).

10. *Id.* § 1603(a).

11. *Id.* § 1604.

elsewhere and that act causes a direct effect in the United States."[12] The second is the waiver provision, denying immunity whenever the foreign state "has waived its immunity either explicitly or by implication."[13]

III.

Pemex concedes that its activities were commercial, and Zernicek concedes that Pemex is an agency of the government of Mexico. We focus, therefore, on the question whether the physical suffering and substantial medical expense to which Zernicek was subjected after he returned to the States constituted a "direct effect in the United States."

The House Report on the Act stated that the direct-effects clause would subject the foreign sovereign to United States jurisdiction consistent with principles set forth in § 18 of the Restatement (Second) of Foreign Relations Law of the United States.[14] Section 18, which is entitled "Jurisdiction to Prescribe with Respect to Effect within Territory," requires the conduct abroad to cause an effect in the U. S. that is "substantial" and "occurs as a direct and foreseeable result of the conduct outside the territory." This requirement, however, does not on its face relate to sovereign immunity but rather concerns the extent to which a state may enact substantive rules of law governing outside its territory that has effects within its territory. Although the concern evidenced by § 18 is therefore legislative rather than judicial, the

12. *Id.* § 1605(a)(2) (clause 3).

13. *Id.* § 1605(a)(1).

14. H.R. Rep. No. 94-1487, *supra*, at 19, 1976 U.S. Code Cong. & Admin. News at 6618.

congressional reference to it has led most courts to find guidance in its requirements in interpreting the FSIA.[15]

The direct-effects clause in the FSIA differs from "direct-effect" clauses found in many state long-arm statutes, because the FSIA clause is explicitly intended to encompass effects resulting from commercial as well as tortious activities.[16] The "substantial" and "direct and foreseeable" standards set forth in § 18 of the Restatement are likewise intended to apply in commercial contexts.[17]

Every court that has considered a claim for personal injury sustained in foreign territory has held that subsequent physical suffering and consequential damages are

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15. *See Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C. Cir. 1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111 & n. 9 (5th Cir. 1985); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S. Ct. 510, 83 L.Ed.2d 401 (1984); *Maritime Int'l Nominees v. Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815, 104 S. Ct. 71, 78 L.Ed.2d 84 (1983); *Ohntrup v. Firearms Center Inc.*, 516 F.Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985); *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F.Supp. 981, 989 (N.D. Ill. 1980); *Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284, 1298 & n. 66 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480, 103 S. Ct. 1962, 76 L.Ed.2d 81 (1983); *Harris v. VAO Intourist, Moscow*, 481 F.Supp. 1056, 1062-63 (E.D.N.Y. 1979); *see also* Note, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976*, 13 N.Y.U.J. Int'l L. & Pol. 571, 608-10 (1981). *But see Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311 & n. 32 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S. Ct. 1012, 71 L.Ed.2d 301 (1982); Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. Rev. 474, 502-05 (1980).

16. *Maritime Int'l Nominees*, 693 F.2d at 1111; *see also Texas Trading*, 647 F.2d at 311; H.R. Rep. No. 94-1487, *supra*, at 19, 1976 U.S. Code Cong. & Admin. News at 6618.

17. *See* Restatement (Second) of Foreign Relations Law of the United States § 18 comment f (1965).

insufficient to constitute a "direct effect in the United States" for purposes of abrogating sovereign immunity. In *Sugarman v. Aeromexico, Inc.*,[18] the Third Circuit considered a suit against a Mexican government-owned airline for injuries suffered by a U. S. citizen during a trip to Mexico. While the court found that Aeromexico was not immune because the claim was "based upon a commercial activity carried on [by it] in the United States[19] —another exception to immunity[20]—it also held that causing injury to a U. S. citizen while that person is abroad is "not a direct enough effect" in the United States.[21]

Similarly, in *Upton v. Empire of Iran*,[22] the United States District Court for the District of Columbia held that the continuing effect in the United States of an injury caused to a U.S. citizen by the collapse of the roof of an airport in Tehran, Iran was not the kind of direct effect required by the Act. And the Ninth Circuit held, in *Berkovitz v. Islamic Republic of Iran*,[23] that, even if the activity of an Iranian agency charged with murdering a U.S. citizen in Iran was commercial, the

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18. 626 F.2d 270 (3d Cir. 1980).

19. *Id.* at 272.

20. 28 U.S.C. § 1605(a)(2) (clause 1) (1982).

21. *Sugarman*, 626 F.2d at 272. *Accord Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp. 578, 586 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1140 (3d Cir.), *cert. denied*, _____U.S._____, 107 S. Ct. 578, 93 L.Ed.2d 581 (1986); *Close v. American Airlines, Inc.*, 587 F.Supp. 1062, 1064-65 (S.D.N.Y. 1984).

22. 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

23. 735 F.2d 329 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S. Ct. 510, 83 L.Ed.2d 401 (1984).

"direct effect" of his death was in Iran, not in the loss that his survivors suffered in the United States.[24]

Zernicek contends that the courts have drawn an unjustifiable distinction between injuries suffered by individuals and corporations. He relies on decisions holding that a purely economic injury to a United States corporation, resulting from its activities abroad, constitutes a direct effect in the U.S. These cases simply do not make such a corporate-individual distinction.

In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,*[25] a corporate-injury case, the Second Circuit said that the personal injury cases provide a "paradigm of 'direct.'" The injuries to those persons were "undoubtedly . . . 'direct' effects."[26] It did not then distinguish corporations, although it stated, "Applying the term to a corporation is not so simple."[27] A corporation sustains a direct injury when it suffers a financial loss. It does not follow, however, that such an injury is necessarily "in the United States." In *Texas Trading,* a sufficient nexus was found between the injury and the United States because of two factors: The injured corporation was to present documents and collect money in the U.S., and the plaintiff was an American corporation.

This court has applied the same standard for "direct effects in the United States" to both personal injury and

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24. *Id.* at 332. *Accord Australian Gov't Aircraft Factories v. Lynne,* 743 F.2d 672, 674-75 (9th Cir. 1984), *cert. denied,* 469 U.S. 1214, 105 S. Ct. 1189, 84 L.Ed.2d 335 (1985); *Harris,* 481 F.Supp. at 1065; *see also Verlinden,* 488 F.Supp. at 1298.

25. 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148, 102 S. Ct. 1012, 71 L.Ed.2d 301 (1982).

26. *Id.* at 312.

27. *Id.*

financial loss cases. In *Callejo v. Bancomer, S.A.*,[28] we found that a Mexican government-owned bank's breach of a contract with U.S. citizens to repay deposits in dollars instead of pesos did have a "substantial effect" in the U.S. as a "direct and foreseeable result" of conduct outside the U.S.[29] The bank had been well aware that it was dealing with U.S. citizen-investors, had carried on a course of business with them while they were located in the U.S., had telephoned them and mailed certificates of deposit to them here, and had paid interest and principal to them through Texas correspondent banks. The court relied on cases involving financial injury to corporations, and carefully distinguished situations where an American was injured abroad, because in those instances the "effects in the United States . . . were not direct and foreseeable."[30] In contrast, the breach of contract in *Callejo* "was closely and foreseeably tied to the effects felt by the [plaintiffs] in the United States."[31]

Indeed, drawing exactly the opposite conclusion from the breach-of-contract and corporate-injury cases, one writer has complained that courts have been more stringent in applying the direct effects test to financial injury resulting from the breach of a commercial obligation than in personal injury cases.[32]

[1] Congress' use of the term "direct" in the Act was obviously intended to invoke the court's judgment. The

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28. 764 F.2d 1101 (5th Cir. 1985).

29. *Id.* at 1111.

30. *Id.*

31. *Id.* at 1112.

32. Note, *Effects Jurisdiction Under the Foreign Soverign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. Rev. 474, 474-75 (1980).

distinction between an effect that is "direct" and one that is indirect is not quantitative and cannot be programmed into a computer. The district court properly followed the cases holding that the eventual effect in the United States of the personal injury or death of an American citizen while abroad is not direct within the meaning of the Act even if the foreign government agency might foresee that a United States citizen might be injured while travelling or working in its territory.

IV.

[2] The district court also found that Pemex had not impliedly waived its immunity. Although Pemex not only agreed, but virtually required, that CCC subcontract with Brown & Root, the contract between Pemex and CCC states that it is subject only to the jurisdiction of Mexican courts. This contract does not incorporate the terms of the subcontract by reference, and therefore does not incorporate the provision in the subcontract calling for adjudication by American courts. Pemex is not a party to the subcontract. CCC, though it is a party to the subcontract, is 51% owned by a Mexican national and not by Pemex. CCC is in fact more closely affiliated with Brown & Root, through that corporation's 49% ownership, than it is with Pemex. The cases cited by Zernicek about "strawman" corporations[33] are therefore inapposite, for their application would require a confusion of identity between Pemex and CCC. Moreover, as the district court

33. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 628-30, 103 S. Ct. 2591, 2601-02, 77 L.Ed.2d 46 (1983); *Anderson v. Abbott*, 321 U.S. 349, 362-63, 64 S. Ct. 531, 538, 88 L.Ed. 793 (1944); *Edwards Co. v. Monogram Indus., Inc.*, 713 F.2d 139 (5th Cir. 1983), *rev'd on other grounds*, 730 F.2d 977 (5th Cir. 1984) (en banc).

pointed out, Pemex does not appear to have entered the contract with CCC merely for the purpose of avoiding U.S. jurisdiction. It did so to comply with Mexican law. And Mexican nationals employed directly by CCC were working on the Bay of Campeche project.

Zernicek relies on a footnote about implicit waiver in *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*,[34] asserting it to mean that, when contracts are interdependent, have common signatories, and are made in close temporal proximity, each of them incorporates the other's waiver of immunity provisions by implication. A crucial difference in the facts of *Proyecfin*, however, is that the agency of the foreign state was a signatory to the contract waiving immunity and agreeing to litigation outside of its domicile. In contrast, the only contract signed by Pemex expressly provided that the law of its domicile would apply and the courts of its domicile would have exclusive jurisdiction over disputes to which Pemex might be a party. *Proyecfin* is an explicit waiver case that has no application here.

Neither does the language of the cited footnote support Zernicek's claim. The footnote merely refers to Congress' intent that waiver be recognized in cases where a foreign state "has agreed to arbitration in another country or . . . has agreed that the law of a particular country should govern a contract."[35] The Pemex-CCC contract provided precisely the opposite.

For these reasons, we AFFIRM the judgment of the district court.

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34. 760 F.2d 390, 393 n. 2 (2d Cir. 1985).

35. H.R. Rep. No. 94-1487, *supra*, at 18, 1976 U.S. Code Cong. & Admin. News at 6617.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-84-8

MICHAEL ZERNICEK

v.

PETROLEOS MEXICANOS (PEMEX),
RAYOS X INDUSTRIAL DE MEXICO S.A.

(Filed July 26, 1985)

Charles M. Haden, 1450 Two Houston Center, 909 Fannin, Houston, Texas, attorney for plaintiff.

Douglas S. Johnston, Crady & Peden, 1010 Jefferson, Suite 911, Houston, Texas, attorney for defendant Petroleos Mexicanos (Pemex).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff brought this personal injury action in state court pursuant to the Jones Act, the general maritime law and the common law of negligence, alleging that the accident made the basis of this suit (i.e., the over-exposure of radiation) was caused by the unseaworthiness of the vessels on which plaintiff was working and/or by the negligence of the defendant, Petroleos Mexi-

canos (hereinafter "Pemex") and Rayos X Industrial de Mexico S.A. (hereinafter "Rayos X").[1]

This Court acquired jurisdiction of the action pursuant to 28 U.S.C. § 1441(d), whereby the defendant Pemex petitioned for removal on the basis of its being a "foreign state" as such term is defined in section 1603(a) of Title 28, United States Code. The Court is, therefore, exercising its original jurisdiction over an action against a foreign state. 28 U.S.C. § 1330. Shortly after removal from state court, defendant Pemex sought an order of dismissal for want of jurisdiction under the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA" or "the Act"). Although such challenge to the jurisdiction has heretofore been denied by the Court, leave was granted to defendant Pemex to re-urge the same at a later date.

On May 31, 1985, the case was tried to the Court without a jury, defendant Rayos X making no appearance. At the commencement of plaintiff's case, defendant Pemex moved again to dismiss on jurisdictional grounds. At the time defendant so moved, the Court had serious doubts that jurisdiction over defendant Pemex could be established; nonetheless, out of an abundance of caution, the Court deferred a ruling on defendant's motion so that all evidence relative to the jurisdictional question could be developed fully.

Accordingly, having heard the testimony and having reviewed all of the documentary evidence, the Court

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1. Original defendants Brown & Root, Inc. (hereinafter "Brown & Root") and Corporacion de Construcciones de Campeche, S.A. de C.V. (hereinafter "CCC") have been effectively dismissed from this suit pursuant to the Court's Final Judgment which was entered on April 22, 1985 following the compromise and settlement of plaintiff's claims against them.

hereby enters these Findings of Fact and Conclusions of Law, concluding that the Court does not have subject matter jurisdiction of plaintiff's claim against Pemex or *in personam* jurisdiction of Pemex under the Foreign Sovereign Immunities Act. Therefore, plaintiff's cause of action as to defendant Pemex should be dismissed.

FINDINGS OF FACT

In 1980, Pemex and CCC, executed a general contract whereby CCC would provide or subcontract certain services with regard to the oil and gas exploration production operations being conducted by Pemex in the Bay of Campeche off of the Yucatan Peninsula in the Republic of Mexico.[2] (Plaintiff's Exhibit No. 13). In addition, Pemex contracted with Rayos X, another business entity organized under the laws of Mexico, to photograph and inspect pipe welds at the production site by the use of radiological isotopes held in metal containers. Thereafter, in 1981 and 1982, CCC entered into subcontracts with Brown & Root whereby Brown & Root would provide all or part of the services required by the General Contract. (Plaintiff's Exhibits Nos. 14 and 15).

In April of 1981, several years under the employ of Brown & Root, Michael Zernicek commenced his tour of duty in the Bay of Campeche where he served as a pipefitter foreman and later as a general foreman for the Pemex exploration production project. He was assigned to a fleet of vessels, owned or otherwise provided

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2. CCC is a private Mexican business organization owned 49% by Brown & Root and 51% by Corporacion de Industrius y Construcciones S.A.C.V., another private Mexican business organization which in turn is owned by an individual unrelated to Pemex. (Deposion of Patrick Hays at 20).

by CCC, which were in proximity to the fixed platform then under construction. His primary role was to carry out or supervise any necessary piping or other structural work for the platform.

This personal injury cause of action arose out of events occurring during the period of October, 1981 through April, 1982 while plaintiff was serving his tour in the Bay of Campeche. (Pretrial Order at 2). Although the exact date, time, and place of exposure is unclear from the record, it is clear that while under the employ of Brown & Root at the Bay of Campeche job site, plaintiff suffered an overexposure of radiation. Such radiation emanated from materials owned, used and controlled by Rayos X. Plaintiff became ill during the fall and winter months of 1981 and after initial treatment in Mexico, returned to the United States for medical evaluation and care where in January of 1982, he was diagnosed as having acute and resolving radiation sickness. The symptoms of the radiation sickness have now reached a plateau in the form of disabling headaches, nausea, diarrhea and weakness. (George Whalen, M.D.) Upon his return to the United States, plaintiff continued under the employ of Brown & Root until he initiated this lawsuit in June of 1982. Although he has since been employed for short periods of time, Mr. Zernicek, now 34 years of age, is currently unemployed.

CONCLUSIONS OF LAW

Foreign Sovereign Immunity

Passed in 1976, the FSIA codified the restrictive theory of sovereign immunity and attempted to provide a uniform statutory procedure for establishing subject matter and

personal jurisdiction over foreign sovereign entities. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 485 (1983); *Vencedora Oceanico Navigacion v. Compagnie Nationale Algerienni de Navigation,* 730 F.2d 195 at 198, *reh'g en banc denied,* 734 F.2d 1479 (5th Cir. 1984). *See generally,* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 6604 (hereinafter "H.R. Rep.").

The FSIA[3] grants sovereign immunity to foreign states,[4] their agencies and instrumentalities, except as provided by the Act.[5] There is personal jurisdiction when foreign states are served with adequate notice as specified in the Act[6] and when subject matter jurisdiction is present. 28 U.S.C. § 1330(b) (1977). Under section 1330(a), subject matter jurisdiction is present whenever the foreign state enjoys no immunity from the claim as

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3. The provision conferring jurisdiction in the Act, 28 U.S.C. § 1330(a), creates in district courts:

> original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in Section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under Sections 1605-1607 of this title or under any applicable international agreement.

4. The parties agree that Mexico is a foreign state and that Pemex is an agency or instrumentality of such state within the meaning of the FSIA. It is also agreed that Pemex is engaged in commercial activity outside the territory of the United States.

5. The general grant of foreign sovereign immunity in the FSIA provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604.

6. Service of adequate notice is also not at issue.

provided in sections 1605-1607, the listed exceptions to immunity. These exceptions establish in certain specified types of cases the necessary contacts that must exist before United States courts can exercise jurisdiction.

Plaintiff argues that the district court has jurisdiction under section 1605(a)(1), the "waiver" clause, providing for jurisdiction over certain cases in which the foreign state "has waived its immunity either explicitly or by implication," and under section 1605(a)(2), clause three, providing for jurisdiction over certain cases relating to the commercial activities of a foreign state. The Court now turns to these sections, noting that the party claiming FSIA immunity, in this instance Pemex, bears the burden of proving their nonapplicability. *Vencedora Oceanico Navigacion,* 730 F.2d at 199; *Arango v. Guzman Travel Advisors Corp.,* 621 F.2d 1371, 1378 (5th Cir. 1980).

Section 1605(a)(1)

Plaintiff first argues that the Court should find subject matter jurisdiction under 1605(a)(1). Section 1605(a)(1) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication . . .

28 U.S.C. § 1605(a)(1).

Plaintiff contends that Pemex implicitly, if not explicitly, waived its sovereign immunity. This waiver is evidenced, in his view, because Pemex gave express con-

sent to CCC to enter into any required subcontracts with Brown & Root (Appendix A at 2); and because pursuant to that consent clause, CCC agreed with Brown & Root that the law of the State of Texas would govern and control any claims based upon the acts or omissions of the parties. (Appendix B at 4). According to plaintiff, his viewpoint that the 28 U.S.C. § 1605(a)(1) exception applies is supported by the following legislative history of the Act:

> With respect to implicit waivers, the courts have found such waivers where a foreign state has agreed . . . that the law of a particular country should govern a contract.

H.R. Report, *supra*, at 6617.

Further, plaintiff argues that CCC was a sham corporation, a "straw-man", created and organized in an attempt to shield Pemex from liability or jurisdiction of the United States courts, and that such interposition resulted in circumvention of the Act by Pemex. *Citing Anderson v. Abbott*, 321 U.S. 349, *reh'g denied*, 321 U.S. 804 (1944) and *Edwards Co., Inc. v. Monogram Indus., Inc.*, 713 F.2d 139 (5th Cir. 1983), *reh'g en banc*, 730 F.2d 977 (5th Cir. 1984), plaintiff asserts that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement; and that the paramount policy here to be protected vis a vis the FSIA is the welfare of the United States citizens who are deliberately subjected to a known danger by Pemex.

The legislative history of the FSIA gives three examples of cases in which courts have found implied waivers:

(1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity. H.R. Report, *supra*, at 6617. Since the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985).

Cases involving arbitration clauses illustrate that provisions allegedly waiving sovereign immunity are narrowly construed. Courts have found an implicit waiver under section 1605(a)(1) in cases involving contracts in which a foreign state has agreed to arbitrate disputes without specifying jurisdiction in a particular country. *See, e.g., Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D. D.C. 1980); or where another nation has stipulated that American law should govern any contractual disputes, *see Resources Dynamics Int'l, Ltd. v. General People's Comm.*, 593 F. Supp. 572, 575 (N.D. Ga. 1984). But most courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States. *Frolova*, 761 F.2d at 372.

Another indication that the implicit waiver clause of section 1605(a)(1) is narrowly construed is the line of cases holding that a country's waiver of immunity does not apply to third parties not privy to the contract. *See Keller v. Transportes Aereos Militares Ecuadorianis*, 601

F. Supp. 787, 788-89 (D. D.C. 1985); *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1285 (E.D. Pa. 1981). Thus courts rarely find that a nation has waived its soverign immunity, particularly with suits brought by third parties, without strong evidence that this is what the foreign state intended. *See Maritime Int'l Nominees Establishment v. Republic of Guinea,* 693 F.2d 1094, 1100 n.10 (D.C. Cir. 1982) (Congress contemplated waivers of a much more specific and explicit nature than the one constructed by plaintiff), *cert. denied,* 104 S. Ct. 71 (1983). *Castro v. Saudi Arabia,* 510 F. Supp. 309, 312 (W.D. Tex. 1980) (there must be intentional and knowing relinquishment of sovereign immunity defense) *citing Mitchell v. Aetna Casualty & Surety Co.,* 579 F.2d 342, 347 (5th Cir. 1978).

In the case at bar, Pemex executed a written contract with CCC under which CCC was to provide equipment and perform construction services for Pemex in the Bay of Campeche. (Plaintiff's Exhibit No. 13). CCC subcontracted significant portions of the work to Brown & Root (Plaintiff's Exhibits Nos. 14 and 15). Brown & Root employed plaintiff. Pemex knew that CCC would in all probability use Brown & Root as its subcontractor. (Plaintiff's Exhibit No. 13). Brown & Root knew that Pemex was the owner of the project on which Brown & Root would be working. (Plaintiff's Exhibits Nos. 14 and 15). The Pemex-CCC contract specifies that Mexican law will apply and that Mexican courts will have exclusive jurisdiction of any Pemex-CCC disputes. (Appendix A at 8). The CCC-Brown & Root contract specifies that United States law will apply and that United States courts will have jurisdiction with respect to any

Brown & Root-CCC disputes. (Appendix B at 4). There is no provision in any contract under which Pemex purports to agree that United States laws will be applicable or that United States courts will have jurisdiction. Moreover, upon a close reading of the contracts, it is evident that Brown & Root was aware that they must be specific as to Pemex in their contract with CCC if they expected Pemex to be contractually bound. (*See* Appendix B). On the basis of these facts, it is clear that Pemex neither explicitly nor implicitly waived its immunity from suit in the United States with respect to the plaintiff's claim.

Further, it is the Court's view that plaintiff's "strawman" theory must fail, as there is no evidence that CCC was a "strawman" which can be disregarded for purposes of determining jurisdiction under the FSIA. There is no evidence that CCC was organized for an improper motive; rather, the record is clear that CCC's existence was essential in order for Pemex to comply with applicable Mexican law which obligated Pemex to contract with Mexican business entities. (Deposition of Mr. Victor Rubio at 27). There is nothing to suggest that CCC failed to maintain a corporate identity separate from Brown & Root or that Brown & Root effectively controlled the business affairs of CCC. Although plaintiff offered testimony that most of the construction workers were North Americans, plaintiff, Robert Browning and Victor Valdez all testified that there were numerous Mexican nationals engaged in the construction work. Moreover, given the fact that Pemex was completely unrelated to CCC, there exists no confusion of identity or ambiguity as to the separateness of CCC and Pemex as is required in *Edwards* and *Abbott*.

Finally, case law clearly establishes that the focus of analysis for determining whether a foreign sovereign has impliedly waived its immunity must be on the acts of the foreign sovereign, not others. *See Maritime Int'l. Nominees Establishment v. Republic of Guinea*, 693 F. 2d at 1102; *Transam. S.S. Corp. v. Somali Democratic Republic*, 590 F. Supp. 968, 974 (D. D.C. 1984). In the opinion of this Court, there is nothing in the record to suggest that Pemex consented to being bound by foreign law or being subject to proceedings in a foreign forum.

Section 1605(a)(2)

Plaintiff argues next that the Court should find subject matter jurisdiction under the third clause of 1605(a)(2). Section 1605(a)(2) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> > (2) in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .

28 U.S.C. § 1605(a)(2).

Plaintiff contends that as a result of the radiation sickness suffered by him and induced by Pemex's acts in the Bay of Campeche, he has suffered direct effects of radiation exposure while in the United States between tours of Bay of Campeche duty (during the period of April 1981 through April 1982). This is so, according to plain-

tiff, because radiation sickness is an ongoing malady which affects the cell growth in the human body. Moreover, plaintiff asserts that because of the nature of his ailment, the ongoing direct effects of the radiation exposure have manifested themselves, in the first instance and for the first time, here in the United States, constituting a "direct effect" in the United States as that term is understood under the FSIA.

Case law dealing with the "direct effect" issue in the context of a personal injury claim based on activity occurring outside the United States has consistently held that subsequent receipt of medical attention and the lingering effects of the injury after the claimant has returned to the United States does not satisfy the "direct effect" requirement. *Yugoexport, Inc. v. Thai Airways Int'l., Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984) (either an injury or an act must occur in the United States for jurisdiction to exist), *cert. denied*, 53 U.S.L.W. 3807 (U.S. May 14, 1985) (No. 84-1483); *Berkowitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir. 1984), *cert. denied*, ____U.S.____, 105 S. Ct. 510 (1984) (death of American in political violence in Iran did not have sufficient direct effect in the United States); *Close v. Am. Airlines, Inc.*, 587 F. Supp. 1062, 1065 (S.D.N.Y. 1984); *Harris v. VAO Intourist*, 481 F. Supp. 1056 (E.D.N.Y. 1979); *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D. D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979). In short, courts have uniformly held that a personal injury suffered outside the United States does not form a basis for jurisdiction under the third clause, even if the injury lingers after the plaintiff returns to the United States.

The decision in *Close* is most directly applicable to this case. In *Close,* the plaintiff, a citizen of Connecticut, was injured at an airport in Jamaica when jet wash from an airplane knocked her down. She incurred medical expenses and was disabled from continuing her occupation. The court held that the economic impact of her injuries in the United States and her disability in the United States did not constitute a "direct effect" under the third clause of 28 U.S.C. § 1605(a)(2). Accordingly, the complaint was dismissed for want of jurisdiction. Nonetheless, the plaintiff in the case *sub judice* seeks to distinguish the overwhelming weight of case authority by urging that the effects of radiation exposure are not manifest for a long period of time after the exposure. In the Court's view, this theory, though creative and novel, raises a distinction without a difference.

The acts of Pemex about which plaintiff complains are alleged failures by Pemex adequately to supervise Rayos X. Plaintiff was exposed to radiation only at the jobsite in the Bay of Campeche. He became ill at that location. He received medical treatment in Mexico. He returned to the United States where he received and does receive additional medical treatment. Accordingly, the distinction proffered by plaintiff simply demonstrates that plaintiff's claimed "direct effect" is just as obscure, uncertain and indirect as was the case in *Close* and affords no basis for altering the analysis or results in the prevailing case law. Accordingly, the court concludes that plaintiff's claim of jurisdiction under the third clause of section 1605(a)(2) must fail.

Conclusion

Having considered both theories offered by plaintiff to support his claim of jurisdiction over the defendant, Pemex, the Court is of the view that neither may succeed. Consequently, the Court concludes that Pemex enjoys sovereign immunity as a matter of law, which immunity bars this action as to it. Accordingly, defendant Pemex's motion to dismiss is granted.[7]

In the event that any of the foregoing Findings of Fact constitute Conclusions of Law, they are adopted as such. In the event that any of the foregoing Conclusions of Law constitute Findings of Fact, they are adopted as such.

The defendant is directly to submit a final judgment incorporating by reference the Court's Findings of Fact and Conclusions of Law within twenty (20) days of receipt hereof.

SIGNED AND ENTERED at Houston, Texas, on this the 26th day of July, 1985.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

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7. Having determined that no legal basis for *in personam* on subject matter jurisdiction exists as to defendant Pemex, the Court need not reach the other substantive issues in this action as to it.

APPENDIX A

The general contract as executed by Pemex and CCC provided, in relevant part, that:

1. PEMEX* and the CONTRACTOR [CCC] declare that they acknowledge and accept the partial subcontracting of the works which are the subject of this Contract, with the DESIGNATED SUBCONTRACTOR [Brown & Root]. (Plaintiff's Exhibit 13, at 2).

2. TWO — SUBCONTRACTING
PEMEX . . . gives its express consent so that the CONTRACTOR may subcontract a partial or total rendering of the works and/or services agreed upon with the DESIGNATED SUBCONTRACTOR. Thus, said CONTRACTOR shall be authorized to enter into all contracts required with said DESIGNATED SUBCONTRACTOR in order to carry out the aforementioned subcontracting. (*Id.* at 3).

3. THREE — LIABILITY
Independently of the agreement stipulated in the previous clause, the CONTRACTOR . . . acknowledges and accepts that he shall be solely and directly responsible before PEMEX for . . . fulfilling each and every one of the stipulations contained in this Contract. (*Id.*).

4. FOUR — AMOUNT OF WORKS AND SERVICES
PEMEX shall pay the DESIGNATED SUBCONTRACTOR . . . in U.S. dollars, directly at the bank appointed by the DESIGNATED SUBCONTRACTOR . . . (*Id.* at 4).

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* Within the three relevant contracts and subcontracts, PEMEX is referred to as "Owner", CCC as "Contractor"; and Brown & Root as "Subcontractor".

5. SIX — PROGRAM
PEMEX shall at all times hereunder have the right to make changes in the work and/or services . . . (*Id.* at 5).

6. ELEVEN — SUPERVISION OF WORK AND/OR SERVICES
PEMEX . . . shall be entitled to supervise, at all times, the quarters services covered hereunder . . . The CONTRACTOR is required to have at the job site an expert representing said CONTRACTOR . . . previously accepted by PEMEX. (*Id.* at 8).

7. TWENTY-ONE — SUBCONTRACTING
For the purposes of this Contract, the term "subcontracting" shall refer to an act whereby the CONTRACTOR entrusts to another company the total or partial performance of the work and/or services, subject of the Contract.

In any case of subcontracting, the CONTRACTOR shall be responsible for the performance of the Works and/or services. (*Id.* at 16).

8. TWENTY-FIVE — CONCILIATION AND APPLICABLE LAWS
If any discrepancy should arise with respect to the interpretation of non-fulfillment of the rights and/or obligations established in this Contract, . . . either party may resort to the Federal Courts of Mexico City, Federal District, to the jurisdiction whereof the parties submit expressly, waiving any other. (*Id.* at 19, 20).

APPENDIX B

The Subcontract, as executed by CCC and Brown & Root, Inc., in 1981 and 1982 are virtually identical and provide in relevant part that:

1. COMMENCEMENT OF THE WORK
Subcontractor agrees to commence the Sublet Work in accordance with the General Contract . . . (Plaintiff's Exhibits Nos. 14 and 15 at 3).

2. APPLICABILITY OF GENERAL CONTRACT
General Contractor shall provide Subcontractor with the General Contract terms governing the Sublet Work. Subcontractor agrees to perform the Sublet Work in accordance with such terms so far as applicable to the Sublet Work. General Contractor shall be bound to the Subcontractor by all of the obligations that the Owner assumes to the General Contractor under the General Contract and by all the provisions thereof affording remedies and redress to the General Contractor from the Owner, except as otherwise expressly provided herein. Subcontractor shall have an opportunity to be present and to submit evidence in any arbitration or other proceeding involving its rights, provided such is agreeable to the Owner. Subcontractor shall make any claim for extras, request for extensions of time and claim for damages or otherwise, authorized by this Subcontract and give any notices provided for in the General Contract or in this Subcontract to the General Contractor in the manner provided in the General Contract for like claims . . . (*Id.* at 5, 6).

3. QUALITY OF THE WORK AND LIABILITY
Subcontractor shall perform the Sublet Work in accordance with good professional practices and

with due skill, diligence and care normally employed by reputable and comparable international organizations subject to the terms of the General Contract and this Subcontract. (Plaintiff's Exhibit No. 14 at 9; Plaintiff's Exhibit No. 15 at 8).

4. GOVERNING LAW
It is agreed by and between the parties hereto for themselves and all persons claiming under them that the laws of the State of Texas, United State of America, shall be the laws applicable to the interpretation of this Subcontract and such laws shall govern and be followed in the construction and interpretation of all of its terms. It is also agreed that all acts or omissions of the parties occurring within the course and scope of the performance of this Subcontract shall be governed and controlled by the laws of the State of Texas, United States of America, and that accordingly, the respective rights and liabilities of the parties both in tort and in contract with relation to all such acts or omissions shall be governed by the laws of the State of Texas . . . (Plaintiff's Exhibit No. 14 at 13; Plaintiff's Exhibit No. 15 at 11).

5. POLLUTION CONTROL
General Contractor shall use its best efforts to include, in each General Contract entered into between Owner and General Contractor which calls for Sublet Work to be offered to Subcontractor, a clause covering pollution, which clause shall be identical to or substantially follow the language contained in the draft attached hereto . . . (Plaintiff's Exhibit No. 14 at 19; Plaintiff's Exhibit No. 15 at 16).

6. TAXES
General Contractor shall use its best efforts to have a clause inserted in the General Contract

in each case which is identical to or substantially similar to the clause contained in the draft attached hereto . . . (Plaintiff's Exhibit No. 14 at 19).

7. SUBCONTRACTOR AS "INDEPENDENT CONTRACTOR"

In the performance of the Sublet Work the Subcontractor is an independent contractor with the right to supervise, manage and control the performance of the details thereof, General Contractor and Owner being interested only in the results of the same and being entitled to inspect the performance of the Sublet Work by Subcontractor only to the extent necessary to assure such results. (Plaintiff's Exhibit No. 14 at 20; Planitiff's Exhibit No. 15 at 16).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2663

D.C. Docket No. CA-H-84-8

MICHAEL ZERNICEK,
Plaintiff-Appellant,

versus

BROWN & ROOT, INC., ET AL.,
Defendants,

PETROLEOS MEXICANOS,
Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

Before RUBIN, GARZA, and JONES, Circuit Judges.

(Filed October 8, 1987)

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 11, 1987

ISSUED AS MANDATE: October 5, 1987

No. 87-914

Supreme Court, U.S.
FILED
DEC 30 1987
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CLERK

In The

Supreme Court of the United States

October Term, 1987

MICHAEL ZERNICEK,

Petitioner,

v.

PETROLEOS MEXICANOS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petroleos Mexicanos ("Pemex") files this Brief in Opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Foreign Sovereign Immunities Act of 1976 ("the Act" or "the FSIA") does not grant subject matter jurisdiction to the district court in actions brought against a

foreign sovereign for personal injuries suffered by a citizen of the United States outside the territory of the United States, even where the effects of the injury linger after the individual has returned to the United States. The decisions below to that effect are in accord with a uniform body of case law construing and applying the Act. The findings of the District Court is affirmed by the Court of Appeals that Pemex had not waived its sovereign immunity is supported by the record. Accordingly, there is no substantial question of law which would justify the grant of a writ of certiorari in this case.

ARGUMENT

I. Zernicek's Claimed Injury Suffered in Mexican Territorial Waters Does Not Constitute a Direct Effect in the United States Under 28 U.S.C. § 1605(a)(2)

Zernicek brought this action against his employer, Brown & Root, Inc., Pemex, and two Mexican business entities, Rayos X Industrial de Mexico S.A. ("Rayos X") and Corporacion de Construcciones de Campeche S.A. de C.V. ("CCC") claiming that he suffered from exposure to radioactive materials used by Rayos X in welding inspection equipment. The events about which Zernicek complains occurred in and around offshore oil production platforms being constructed by Pemex in the Bay of Campeche in the territorial waters of the United Mexican States. Zernicek settled with his employer and CCC. A default judgment was entered against Rayos X, leaving Pemex

as the remaining defendant. After a full trial the District Court dismissed Zernicek's claim against Pemex for want of subject matter and *in personam* jurisdiction under the Foreign Sovereign Immunities Act of 1976. 90 Stat. 2892.

The FSIA created a comprehensive and exclusive statutory scheme for regulating jurisdiction of federal courts in actions brought against foreign sovereigns. 28 U.S.C. § 1602; H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976), *reprinted* in 1976 U.S. Code Cong. & Admin. News 6604 ("House Report"). The basic grant of subject matter jurisdiction is codified at 28 U.S.C. § 1330(a). The Act provides a general rule of immunity to foreign states except as otherwise provided in the Act. 28 U.S.C. § 1604. The statute grants subject matter jurisdiction to the district courts only with respect to claims brought against a foreign state where the foreign state is not entitled to immunity under other provisions of the FSIA or applicable international agreement. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 489, 76 L.Ed.2d 81, 89, 103 S.Ct. 1962 (1983). Zernicek asserts that the general rule of immunity is not applicable in this case because of the so called "direct effect" exception set forth in 28 U.S.C. § 1605(a)(2):

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—
>
> • • •
>
> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

Zernicek's claim is based upon events occurring in the Bay of Campeche in Mexican territorial waters. For purposes of this case Pemex has conceded that its activities relative to this case were commercial in nature. Thus, the only contested issue with respect to the "direct effect" exception in § 1605(a)(2) is whether the "act[s] outside the territory of the United States" "cause[d] a direct effect in the United States."

Since enactment of the FSIA in 1976 the "direct effect" clause of § 1605(a)(2) has been interpreted and applied in numerous cases brought by United States citizens for personal injury or death suffered from events occurring outside of the United States. The courts have uniformly held in these cases that 28 U.S.C. § 1605(a)(2) does not provide an applicable exception to the general rule of immunity, even if the injury lingers after the injured person returns to the United States. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3rd Cir. 1980); *Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp. 578, 586 (E.D.Pa. 1985), *aff'd mem.*, 800 F.2d 1140 (3rd Cir.), cert. denied, — U.S. —, 107 S.Ct. 578, 93 L.Ed.2d 581 (1986); *Close v. American Airlines, Inc.*, 578 F.Supp. 1062, 1064-65 (S.D.N.Y. 1984); *Upton v. Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C.), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); *Berkowitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S.Ct. 510, 83 L.Ed.2d 401 (1984); *Harris v. VAO Intourist*, 481 F.Supp. 1056, 1065 (E.D.N.Y. 1979).

The decisions carry out the Congressional intent to provide a uniform set of guidelines for adjudicating claims

of foreign states to immunity. House Report at 13. The decisions of the District Court and Court of Appeals below are in line in all respects with the analysis and results in this uniform body of case law.

Zernicek urges a departure from the settled interpretation of the direct effect clause in § 1605(a) because of a claimed discriminatory treatment by the Courts when applying the direct effect clause in § 1605(a)(2) in actions brought by individual as opposed to corporate claimants. Setting aside the question of whether there is any rational basis for distinguishing between claims for personal injury and claims for commercial loss, Zernicek's argument is not persuasive because no such corporate-individual differentiation exists. Indeed, in the cases cited by Zernicek the Courts have explicitly recognized that the results in the personal injury cases are in harmony with the cases in which injury occurs to corporate interests. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-1112 (5th Cir. 1985). Accordingly, there is no basis for further review of the decisions below.

II. The Record Supports the Findings of the Courts Below that Pemex Did Not Waive Its Soverign Immunity

Zernicek asserts that the Courts below erred in finding that Pemex had not waived its sovereign immunity. Waiver is one of the enumerated exceptions to the general

rule of immunity. 28 U.S.C. § 1605(a)(1). Zernicek's waiver claim is based upon the fact that Pemex entered into a construction contract with CCC, a Mexican contractor, and CCC contemporaneously entered into a subcontract with Brown & Root, Inc., Zernicek's employers. The Pemex-CCC contract specified that the contract was to be governed by Mexican law with Mexican courts having exclusive jurisdiction over any disputes involving Pemex. The CCC/Brown & Root contract specified that that contract would be governed by Texas law and that Texas courts would have jurisidiction over any CCC/Brown & Root disputes.

The District Court found that the existence of these two contracts did not evidence an intent by Pemex to waive its immunity and did not evidence an implicit waiver of immunity. The Court of Appeals affirmed these findings. Zernicek challenges these findings as being contrary to the holding in *Proycefin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390 (2d Cir. 1985). However, in *Proyecfin* the foreign sovereign was signatory to the contract waiving immunity. *Id.* at 393 n.2. In contrast the only contract signed by Pemex contained no express waiver of immunity and provided that the laws of Mexico would apply to the contract and that Mexican courts would have exclusive jurisdiction over cases in which Pemex was a party. Accordingly, *Proyecfin* has no application to this case and there is no basis for disturbing the findings below that Pemex did not waive its sovereign immunity.

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CONCLUSION

The Courts below correctly decided the jurisdictional issues in accord with well-settled principles codified in the FSIA and consistently applied in a uniform body of case law. There is no basis for granting a writ of certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

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